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No. 436

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	9
Conclusion	9
Appendix A	10
Appendix B	19
Appendix C	20

CITATIONS

Cases:

United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 6

Statutes:

McCarran-Ferguson Act, act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 15 U. S. C. 1011–1015 ..... 2, 3, 5, 6, 8

Federal Trade Commission Act, Sec. 5, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45 ..... 2, 3, 6

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THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on April 9, 1957.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 10–18) is reported at 243 F. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1957 (Appendix B, *infra,* p. 19). The time for filing a petition for writ of certiorari was extended by Mr. Justice Black on June 27, 1957, to September 6, 1957 (Appendix C, *infra,* p. 20). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

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QUESTION PRESENTED

Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) authorizes the Federal Trade Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. The question presented is whether the McCarran-Ferguson Act (15 U. S. C. 1011–1015) is to be construed as divesting the Commission of jurisdiction over false and misleading advertising in connection with the interstate sale of insurance because of the mere enactment of state laws prohibiting such practices within the boundaries of the states involved.[1]

STATUTES INVOLVED

The statutes involved are pertinent provisions of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45, and the Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 15 U. S. C. 1011–1015 (herein referred to as the McCarran-Ferguson Act). These are the same statutes that are involved in the accompanying petition for a writ of certiorari in *Federal Trade Commission* v. *National Casualty Company,* and are reproduced in that petition at pages 2–4.

STATEMENT

On October 14, 1954, the Federal Trade Commission issued a complaint against the respondent, The American Hospital and Life Insurance Company, charging

[1] This is the same question as that presented in the accompanying petition for a writ of certiorari in *Federal Trade Commission* v. *National Casualty Company.*

that the company had, in the course of its interstate business of selling accident and health insurance, falsely advertised its insurance policies and thereby violated the Federal Trade Commission Act (R. 8–16). The company filed answer in which it admitted that it had advertised its accident and health insurance policies as charged in the complaint but denied that its advertising was false or misleading and denied that it had violated the Federal Trade Commission Act (R. 21–33). The company's answer affirmatively alleged that under the McCarran-Ferguson Act the Commission was without jurisdiction over the company's interstate insurance business because of the enactment of state statutes regulating unfair or deceptive acts or practices within the states involved (R. 19–21).

The facts. The basic facts relating to the conduct of respondent's business as found by the Commission are as follows:

The American Hospital and Life Insurance Company is a Texas corporation with its principal place of business in that state. It is engaged in selling life, health, and accident insurance and is licensed to sell such insurance in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. The challenged representations related only to its accident and health insurance business, from which it received premiums of $4,835,523.05 in 1953 and $5,009,184.47 in 1954 (R. 92–93).

Respondent sells its health and accident insurance policies through agents in the various states where it is licensed to do business. When an agent in a state other than Texas secures an application for a policy, the agent sends the application through the mail with the premium payment to respondent in Texas, where the policy is issued. The policy is mailed by respondent to the agent in the other state for delivery to the purchaser (R. 93, 94–95).[2]

For the purposes of selling insurance, respondent prepares and sends circulars or brochures from Texas to its agents located in the various states in which it is licensed. These circulars or brochures, which contain the challenged representations, are used by the agents and shown by them to prospective purchasers as aids in selling the policies to which they refer. Upon completion of a sale, the advertising portions of the circular or brochure are left with the purchaser (R. 94).

Hearings were held before an examiner who issued an initial decision in which he ordered that the complaint be dismissed (R. 87). On the basis of the McCarran-Ferguson Act, the examiner held that the Commission had no jurisdiction with respect to allegedly

[2] In the substantial number of cases where purchasers of policies have moved from states where respondent was licensed to do business into states where respondent was not so licensed, respondent's practice is to mail premium notices and receipts to and to receive premium payments from the policyholder. Premium payments so received amounted to $47,305.72 in 1953 and $78,417.89 in 1954 (R. 93–94).

false and deceptive acts and practices in commerce carried on by respondent except with persons living in the state of Mississippi (R. 57).[3] He further held that the charges of the complaint as to the false and misleading nature of the advertising had not been established (R. 57–87).

The Commission decision. The examiner's decision was reversed by the Commission, holding that all but one of the advertising representations set forth in the complaint were unfair and deceptive as charged (R. 90–101). It further held that it had jurisdiction over the unfair and deceptive advertising practices of respondent in interstate commerce, irrespective of whether the states involved had adopted local laws relating to such practices (R. 104–122), and entered an order consonant with its views (R. 101–103).[4]

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[3] He found that ten of the states in which respondent does business (Arizona, Arkansas, Colorado, Indiana, Kansas, Kentucky, Louisiana, New Mexico, Oklahoma, and Tennessee) had enacted statutes identical, or substantially identical, with the so-called "Model Unfair Trade Practices Bill for Insurance," which prohibits unfair methods of competition and unfair and deceptive acts and practices in the insurance business; that two of the other states in which respondent does business, Missouri and Illinois, had comparable statutes; that Mississippi did not; and that the statutes of Texas were immaterial since respondent's business within that state was intrastate (R. 51–56).

In the period between the examiner's decision and the Commission's decision, the state of Mississippi enacted a regulatory statute (R. 158).

[4] The Commission's opinion is reproduced as Appendix D of the accompanying petition in *Federal Trade Commission* v. *National Casualty Co.*

On the question of its jurisdiction, the Commission recognized that the McCarran-Ferguson Act was enacted for the purpose of allowing the states to continue to regulate the business of insurance in their usual manner, thus dispelling doubts raised by *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. But the Commission did not read the Act, especially in the light of the circumstances that led to its passage, as a complete abdication of all federal regulation of the interstate aspects of the business of insurance (R. 106–122). Such activities, the Commission held, could not be "regulated by State law" and hence remained subject to its jurisdiction by virtue of the McCarran-Ferguson Act proviso "[t]hat after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law" (R. 113). In the Commission's view (R. 120), there is "an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation 'to the extent that such business is not regulated by State law' is inoperative."

Implicit in the view of the hearing examiner, the Commission stated (R. 106), "is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. * * * We do not think that the

McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation, admits of such a construction. * * *"

The Commission further stated (R. 114, 115, 120-121):

* * * * *

> The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.
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> * * * * *
>
> * * * Congress gave the States about three years in which to define a reasonable area of State

police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. * * *

The Commission thus concluded that the mere enactment of a state law relating to advertising practices of insurance companies did not operate to oust it of jurisdiction.

The Court of Appeals decision. On respondent's petition to review, the court below set aside the Commission's order, holding that the Commission under the McCarran-Ferguson Act was without jurisdiction (*infra,* pp. 10–18).

REASONS FOR GRANTING THE WRIT

The basic question presented in this case is the same as that presented in the accompanying petition for a

writ of certiorari in *Federal Trade Commission* v. *National Casualty Company*. The facts in the two cases are quite similar, except that respondent in the instant case does not mail advertising literature directly to prospects in other states and that there is no evidence that its agents use the mails to disseminate such literature to prospects.

The reasons for granting the writ, therefore, are fully stated in the petition in the *National Casualty Company* case.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Federal Trade Commission.

SEPTEMBER 1957.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 16132

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION, SITTING AT WASHINGTON, D. C.

(April 9, 1957)

Before HUTCHESON, *Chief Judge,* and CAMERON and JONES, *Circuit Judges*

JONES, *Circuit Judge:* The petitioner, the American Hospital and Life Insurance Company, is a corporation of Texas. Its principal or home office is in San Antonio, Texas. It is engaged in the business of writing health and accident insurance. It has been licensed to do business and is doing business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma and Tennessee, as well as in the State of Texas. In each of these states the petitioner has agents through whom its business is conducted. Each of the states has statutes forbidding deceptive and mis-

leading advertising. The petitioner employed printed brochures which it sent from its home office to its agents for use in advertising and soliciting business. It did no advertising by newspapers or other periodicals or by radio or television. The Federal Trade Commission issued its complaint against the petitioner charging it with engaging in unfair and deceptive advertising practices in commerce in violation of the Federal Trade Commission Act, 15 U. S. C. A. § 41, et seq. The petitioner asserted that its advertising was not false, misleading or deceptive. It also contended that the Commission was without jurisdiction because of the McCarran Act. After a hearing the Examiner of the Commission, in an initial decision, held that the charges concerning the petitioner's advertising had not been sustained. The Examiner also held that the Commission was without jurisdiction, except as to petitioner's transactions in Mississippi where, at the time of the hearing, there was no adequate law regulating false and deceptive acts and practices. The Commission, on appeal, set aside the initial decision of the Examiner by a three to two decision. It determined that in passing the McCarran Act the Congress did not, and did not intend to, deprive the Commission of the power to regulate and control the interstate activities of insurance companies. It found the advertising brochures which had been sent from Texas to the other states were false and deceptive. It entered a Cease and Desist Order which is before us for review. In the opinion of the majority of the Commission, it was said that "there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by state law."

In the South-Eastern Underwriters case,[1] of which more will be hereafter said, Mr. Justice Black, in the majority opinion, observed that "Perhaps no modern commercial enterprise directly affects so many people as does the insurance business." Although it has not been classed as a public utility charged with the duty of serving all who may apply,[2] the business of insurance has been more generally regulated than any other sphere of business activities not a public utility.[3] It was determined in 1868 that the insurance business did not constitute transactions in commerce,[4] and this doctrine was adhered to in many subsequent decisions.[5] In 1944 came the South-Eastern case, *supra*, where, in a four to three decision, with two justices of the court not participating, it was held generally that insurance businesses are engaged in "commerce among the several states," and specifically that the Sherman Anti-Trust Act[6] applied to insurance activities. Mr. Chief Justice Stone, in his dissenting opinion, said that the action of the majority in overturning the precedents of the seventy-five years "cannot fail to be the occa-

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[1] *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440.

[2] *National Union Fire Insurance Co.* v. *Dickinson*, 128 Ark. 367, 194 S. W. 254.

[3] For a statement of the reasons for and history of the regulation of insurance see 1 Richards on Insurance, 5th Ed. 136, et seq.

[4] *Paul* v. *Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357.

[5] These were reviewed by the Supreme Court in 1913, where it was said of the prior decisions "they constitute a formidable body of authority and strongly invoke the sanction of the rule of stare decisis." *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332.

[6] 15 U. S. C. A. § 1 et seq.

sion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power raising questions which cannot be answered for years to come * * *".[7] The litigation has not yet reached the flood stage and the McCarran-Ferguson Act,[8] sometimes referred to as Public Law 15, and more often merely as the McCarran Act, has been the only national legislation of consequence resulting from the decision. This act was proposed by Senators McCarran and Ferguson and on March 9, 1945, it was signed by the President and became a law. The enactment is brief and many of its provisions are here pertinent.[9]

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[7] 322 U. S. 583.

[8] 59 Stat. 33, 15 U. S. C. A. §§ 1011–1015.

[9] "An act to express the intent of the Congress with reference to the regulation of the business of insurance.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall

The purpose and effect of the McCarran Act has been stated by the Supreme Court, it saying:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state

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be applicable to the business of insurance to the extent that such business is not regulated by State law.

"SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

"SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.

"Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342. See *North Little Rock Transp. Co.* v. *Casualty Reciprocal Exchange,* 8th Cir. 1950, 181 F. 2d 174; *American Universal Ins. Co.* v. *Sterling,* 3rd Cir. 1952, 203 F. 2d 159.

By the Act it was provided not only that the business of insurance should be subjected to regulation by the States, but that until June 30, 1948,[10] the Sherman Act, the Clayton Act and the Robinson-Patman Act should not apply to the business of insurance, and after that date the Sherman and Clayton Acts and the Federal Trade Commission Act should apply to such business to the extent it is not regulated by State law. It is also provided that nothing contained in the Act shall render the Sherman Act inapplicable to any

[10] The moratorium, intended to permit the States to enact regulatory measures if the laws were inadequate for the purpose, was extended from January 1, 1948, to June 30, 1948, by Act July 25, 1947, c. 326, 61 Stat. 448.

agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation. Then too it was provided that the Act should not affect the application of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act to the business of insurance. These provisions evidence a design on the part of Congress to yield to the States which had undertaken, or which would undertake, to regulate the insurance business in those fields in which the Sherman Act might otherwise have been applicable, with the exception of boycotts, coercion and intimidation. Such was the intent of the Congress. Senator McCarran, in response to the query of a colleague, said:

> "The Senator will recall the Southeastern Underwriters case. The decision was startling. It created consternation in the insurance business because by previous decisions rendered during the past 50 years or more we were entitled to believe that the business of insurance was not to be classified as interstate commerce. The Supreme Court of the United States specifically, directly, and emphatically put it into the category of interstate commerce. It put it squarely under the Sherman Act, the Clayton Act, and other Acts. The pending bill is for the purpose of creating a moratorium for 3 years in order that the business of insurance shall not be interfered with by any Federal power under either the Clayton Act or the Sherman Act. So during the period of moratorium the various states themselves may take steps to regulate the business of insurance."

Senator McCarran again said: "The moratorium would not be continued; but if in the meantime the states themselves had regulated the business of insur-

ance, the Sherman and Clayton Acts and the other Acts would not be effective."

The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. The Supreme Court, we think, has expressed the same view in holding, with respect to another phase of state insurance regulation,

> "These regulations can not be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business." *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777.

If there is an "irreducible area" of Commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it.

The Commission relied heavily upon *United States* v. *Sylvanus*[11] in support of its jurisdiction. An indictment was returned, in the Sylvanus case, for use of the mails to defraud in the sale of insurance by

[11] 7th Cir. 1951, 192 F. 2d 96.

mail. The McCarran Act was held to be no bar to prosecution. A fraudulent scheme carried on by use of the mails would violate the mail fraud acts even though the mails never crossed a state boundary.[12] The doctrine of the case, with the decision on which we have no disagreement, is of no bearing on the problem before us here. A violation of the postal laws does not of itself confer jurisdiction on the Federal Trade Commission.

The Commission's Examiner found that each of the States in which the petitioner did business, except Mississippi, had enacted laws for the regulation of false and deceptive advertising. Mississippi enacted such a law while the matter was pending before the Commission. This is not controverted. The Examiner found that the petitioner's advertising matter was not false, misleading or deceptive. Holding, as we do, that the Commission was without jurisdiction, we do not reach the merits.

The order of the Commission is set aside and

Reversed.

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[12] See *New York Life Insurance Co.* v. *Deer Lodge County*, *supra*.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

JUDGMENT

Extract from the Minutes of April 9, 1957

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

v.

FEDERAL TRADE COMMISSION

This cause came on to be heard on the petition of The American Hospital and Life Insurance Company for review of an Order of the Federal Trade Commission issued on April 24, 1956, in Docket No. 6237, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, set aside and reversed.

APPENDIX C

In the Supreme Court of the United States

No. —, October Term, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1957.

(Sgd.) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of June 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957